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IN THE

SUPREME COURT OF THE UNITED STATES

DOCKET NO. 506

GULF, MOBILE AND OHIO RAILROAD COMPANY,
Petitioner

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays for the issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit (Rives, J., dissenting), affirming the judgment of the District Court for the Northern District of Alabama.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Alabama (R. 404-434) is reported at 128 F. Supp. 311. The opinion of the Court of Appeals (Appendix A, pages 21-48; R. 454-481) has not been reported at the time of printing this petition.

JURISDICTION OF THIS COURT

The opinion and judgment of the Court of Appeals are dated August 18, 1955. A timely petition for rehearing was denied by order dated October 3, 1955, (Rives, J., dissenting) (R. 525). The judgment of the Court of Appeals (R. 482) is set out in Appendix B hereto, at page 49, below, and the judgment of the District Court (R. 435-436) is set out in Appendix C, hereto, at page 50, below. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED

Petitioner formerly operated trains over certain tracks of I.C.,[1] under a trackage agreement entered into in 1906. The Interstate Commerce Commission[2] authorized petitioner, in 1952, to abandon such operation, and to shift its traffic to another route. I.C. claims, and Petitioner denies, that after the abandonment Petitioner remains obligated under the trackage agreement to pay I.C. some $150,000 per year rental, in perpetuity. Petitioner is not so obligated if any one of the following questions presented is answered in the negative:

(1) When, after full and fair hearing in a proceeding to which all interested carriers were parties, the Interstate Commerce Commission finds that interstate commerce will be unduly burdened by further operations by GM&O over a portion of I.C.'s railroad, under a trackage contract made prior to the enactment of the Transportation Act of 1920; that the public has no need for such further operation; that public convenience and necessity permit the abandon-

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[1]For convenience, Petitioner will sometimes be referred to as "GM&O", Illinois Central Railroad Company as "I.C.", and Louisville & Nashville Railroad Company as "L & N".

[2]For convenience, sometimes hereinafter referred to as "the Commission."

ment of such operation; and that any resulting injury to I.C. is outweighed by the benefit to GM&O and the public from the abandonment, and, upon the basis of such findings, issues an order and certificate authorizing such abandonment and attaches no condition to such certificate requiring GM&O to make further payments under the trackage contract: Does GM&O, which abandons in compliance with the findings, order and certificate, remain obligated to continue to make payments under the trackage contract? Circuit Judge Rives answered this question in the negative.

(2) Even apart from the effect of the Commission's certificate, will a trackage contract between interstate railroads be construed to impose an obligation to continue payment of rent for trackage rights perpetually after the use of such tracks has been lawfully abandoned in the public interest, in the absence of provisions in the contract which clearly and unequivocally compel such construction in words which admit of no controversy?

(3) Is the Federal duty of an interstate railroad to apply for and act pursuant to the authority of the Commission to effect improvements in the economy and efficiency of its service subordinate to an inconsistent private contractual obligation; and if such Federal duty is paramount over private contractual obligations, does the interstate railroad so applying for and acting pursuant to the authority of the Commission remain obligated to make full payments under a private contract when, as a consequence of the improvements in the efficiency and economy of its operations so effected, it fails to receive any or a substantial part of the return performance for which such payments were the agreed exchange?

STATUTES INVOLVED

This case involves the Congressional declaration of the "National Transportation Policy", which precedes Section

1 of the Interstate Commerce Act; and Sections 1 (18) and 1 (20) of the Interstate Commerce Act. Sections 1 (18) and 1 (20) were added by the Transportation Act of 1920 (See 41 Stat. at L. 477,478); and the "National Transportation Policy" by the Transportation Act of 1940 (See 54 Stat. at L. 899). These statutes are set out in Appendix D, pages 51-52, below.

STATEMENT OF THE CASE

This is a declaratory judgment action instituted by GM&O pursuant to the Declaratory Judgment Act, Title 28, United States Code, Section 2201 (62 Stat. 964). The jurisdiction of the District Court was founded by the complaint on diversity of citizenship. (R. 12) Title 28, United States Code, Section 1332 (62 Stat. 930).

The case concerns the obligation of GM&O to make rental payments to I.C. under a 1906 contract (R. 28-49) which provides that its duration is "the corporate existence of the parties", and that the parties will "perform all acts necessary . . . to continue their corporate existence in perpetuity if possible". (Article 20, R. 45). The rental payment amounted to $149,571 in 1949.[3]

The 1906 contract furnished both GM&O and I.C. links in the respective routes by which each entered Birmingham, Alabama.[4] (R. 155) It provided for trackage rights for GM&O, now abandoned, between Ruslor, Mississippi, and Haleyville, Alabama, over a railroad which I.C. was to construct and did construct at a cost of some $4,300,000. (R. 137) It also provided for trackage rights still used by I.C. over a then existing GM&O railroad between Perry, Tennessee, and Ruslor, Mississippi, and over the lines of another railroad between Haleyville and Jasper, Alabama.

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[3] R. 57; 282 I.C.C. at 314.

[4] G.M.&O. is successor to Mobile and Ohio Railroad Company, one of the original parties to the 1906 contract. (R. 139-140)

I.C. continues to enter Birmingham over these railroads. (R. 153-154)

On May 8, 1950, GM&O filed two applications with the Commission, one under Section 5 (2) of the Interstate Commerce Act for approval of a trackage contract with the L&N for use by GM&O of an L&N line between Tuscaloosa, Alabama, and Birmingham, Alabama; the other under Section 1 (18) of the Interstate Commerce Act for a certificate of public convenience and necessity permitting abandonment of operation over I.C.'s Ruslor-Haleyville tracks, and over Southern Railway Company's connecting lines between Haleyville and Birmingham.[5] The purpose was to shift GM&O's route into Birmingham from the I.C.-Southern route to the less costly and more adequate and efficient GM&O-L&N route. (R. 20-27)

I.C. intervened in the Commission proceedings and vigorously opposed the applications. (R. 146)

Division Four of the Commission granted both applications in a single Report and Order and Certificate. (R. 54-111).[6] The Commission found that by the change in routes, GM&O would increase the efficiency and economy of its operations, service to the public would be improved, a portion of the public would be enabled to reach a market in which previously they had been unable to compete because of inadequate transportation facilities, and that the change in routes would "promote adequate transportation service to the public". (R. 100-103)

I.C. did not apply for "rehearing, reargument or reconsideration". (Section 17 of the Interstate Commerce Act). (R. 148-149)

On the effective date of the Order, April 22, 1952, GM&O commenced the L&N operation, abandoned the

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[5]The location of the various railroads is shown on Ex. 1. (R. 2, 155).

[6]The Report appears at 282 I.C.C. 311. The Order and Certificate is not set out in the I.C.C. Reports, but appears in the Record at 109-111.

I.C.-Southern operation, and discontinued payments to I.C. under the 1906 contract. (R. 149, 151)

I.C. conceded that the abandonment was lawful and that GM&O's obligation to pay I.C. a user proportion of its maintenance and operating expenses for the I.C. Ruslor-Haleyville line, under Article 8 of the trackage contract, was annulled. (R. 415, 460) But the declaratory judgment entered by the District Court was—

> "That plaintiff is legally bound to the defendant under the contract of January 16, 1906 . . . for the payment of rent and one-half the taxes, assessments and other charges, as provided in section 7 of said contract. . . ." (R. 435; Appendix C p. 50).

The Court of Appeals affirmed, Circuit Judge Rives dissenting. (R. 482)

REASONS FOR GRANTING THE WRIT

The majority decision of the Court of Appeals decides novel and important questions of Federal law which have not been but should be settled by this Court. Numerous decisions of this Court, on the other hand, establish the exclusive jurisdiction of the Commission and establish principles governing the construction and application of the Interstate Commerce Act[7] which are ignored by the majority decision below, and hence to that extent the decision below conflicts with relevant decisions of this Court. On either ground, this Court should grant review.

1. A definitive resolution of the questions presented is of vital importance to the national transportation system as a whole, both from the point of view of the carriers themselves, and from that of the effective discharge by the Commission of its duty to implement the National Transportation Policy declared by Congress in the Transportation Act

[7]Herein sometimes referred to as "the Act".

of 1940.[8] The majority decision below holds that the rental obligation of railroads under trackage contracts entered into prior to 1920 are beyond the power of the Commission.[9] In the language of Circuit Judge Rives, dissenting, if that decision stands,

> ". . . it is difficult, if not impossible, to discover any method by which a carrier may be relieved of its obligation under a perpetual lease of operation rights over another's line short of bankruptcy, forced liquidation or dissolution. In the present case, the Commission found that the switch to the lines of the L&N would effect some economy even if the GM&O had to continue its payment of rentals to I.C., though, of course, much greater economy would be effected if such payments ceased. In a case where the economies effected were not so large, would the Commission be powerless to permit the abandonment of that part of the burden of operation?" (R. 478-479; Appendix A, pp. 45-46, below).

The importance of the question of Federal law thus presented is demonstrated by the number of such contracts which are in effect between railroads, and the aggregate annual dollar rentals paid thereunder. While precise data are not available, it appears that at the end of 1954 fifty-one of the one hundred twenty-four Class I railroads of the country were operating over 3,600 miles of tracks belonging

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[8]See Appendix D, page 51, below. The Congressional declaration is hereinafter referred to as the "National Transportation Policy", without repetitive citation.

[9]The Commission has approved all trackage contracts entered into since enactment of the Transportation Act of 1920; but no determination with respect to the public interest was required as to trackage contracts entered into prior to 1920. Since enactment of the Emergency Transportation Act of 1933, approval by the Commission of the acquisition of rights under trackage contracts has been required under Section 5 (2) of the Act; and under Section 5 (9) of the Act, also added by the Emergency Transportation Act of 1933, the Commission is expressly empowered to make such "orders, supplemental to any order made under paragraph (2) . . . as it may deem necessary or appropriate". The questions presented by this case affect, therefore, all long-term contracts entered into by carriers prior to 1920, and may affect all such contracts entered into prior to enactment of the Transportation Act of 1933.

to other carriers under two hundred eighty-seven trackage contracts entered into prior to 1920. The fifty-one railroads for which trackage contracts data are available operated 145,327 miles of railroad in 1954.[10] No data are available with respect to the other seventy-three Class I railroads. The total yearly payments made under trackage contracts by Class I railroads is not known, but some indication of the magnitude of the sums involved is provided by the fact that payments made by GM&O alone for the use of the tracks involved in this case averaged $209,159.91 per annum during the ten-year period 1942-1951 (R. 340), which for the eighty miles of lines involved (R. 134), means that the average annual payment per mile of railroad was $2,614.50. The indicated aggregate current payments made by all Class I railroads under trackage rights contracts entered into prior to 1920 is, therefore, millions of dollars per year.

These calculations are provided, not as precise data, but as approximations reflecting the vital importance of the questions involved to the national transportation system, and to the regulatory power of the Commission. And this Court has decided that rentals paid under trackage contracts are a matter of public concern, and that the amounts of rental paid under such contracts "intimately relate to the financial strength of carriers."[11]

It is clear that the efficacy of the Commission's supervisory functions, and therefore that the attainment of the statutory objective to "promote safe, adequate, economical, and efficient service and foster sound economic conditions

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[10]This information was derived from Poor's Manual of Railroads, 1918; from Moody's Transportation Manual, 1955; and from the Bureau of Railway Economics, Association of American Railroads, Mo. Rept. Ser. No. 551. The trackage contracts outstanding in 1918 were matched with trackage contracts outstanding in 1954, and where the mileage and termini involved were substantially indentical, it was assumed that each trackage contract outstanding in 1954 was the same contract as was in effect in 1918.

[11]See *Thompson Trustee v. Texas Mexican Ry. Co.*, (1942), 328 U.S. 134, 148; *Transit Commission v. United States*, (1933), 289 U.S. 121, 127.

in transportation and among the several carriers",[12] depends in major degree upon a wise and definitive resolution of the questions presented in this case.

This Court should, therefore, grant review.

2. The majority opinion below holds that the Commission "declined to make a finding that payment without use would be an undue burden on GM&O and on interstate commerce"; and that "the Commission found in effect that payment without use would not be an undue burden on GM&O" (R. 462; Appendix A, p. 29, below). In so holding, the majority below ignored the "major findings" of the Commission (R. 100-102), and in particular its major finding No. 8, which expressly holds that abrogation of the rental obligation *is* in the public interest. Major finding No. 8 is,

> "8. That on the whole the benefit to the applicant and the public from the proposal will outweigh any injury which may be inflicted thereby on the protesting railroads". (R. 102)

On its face, major finding No. 8 reflects the expert judgment of the Commission, reached after balancing the impact of its Order and Certificate upon all the carriers involved and upon the public interest.[13] The Commission had before it all the evidence deemed by any party to be material and relevant. In its Report the Commission found the aggregate total of the rents and other payments made by GM&O to I.C. under the 1906 contract during the ten-year period ending June 30, 1950, and as well found separately payments made under the 1906 contract to I.C. in 1949 for rents, maintenance, operation and taxes. (R. 57) It appended to its Report an itemized statement

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[12]Quoted from the National Transportation Policy.

[13]*Cf Central New England Ry. Co. v. Boston & Albany R. R. Co.* (1929) 279 U.S. 415, 420.

showing in Part A the total actual cost to GM&O of the I.C.-Southern operation in 1949; and item 9 of that Part A shows the aggregate of the payments made by GM&O in 1949 to I.C. and Southern for the joint use of their railroads and facilities. (R. 107-109) These data were introduced and considered in connection with GM&O's position, actively asserted in the Commission proceedings and actively resisted there by I.C., that the Certificate and Order authorizing abandonment should abrogate its obligation to pay rent. The Commission held it had no jurisdiction itself to declare that obligation abrogated, but expressly left "to the courts" the issue whether its Certificate and Order would do so. (R. 87-96) In so holding, the Commission cited decisions in other cases, holding that its certificates *do* abrogate such obligations.[14]

It is obvious, therefore, that major finding No. 8 is what on its face it clearly purports to be: A deliberate and conclusive finding that abrogation of the rental obligation is in the public interest.

In so ignoring the relevant and decisive major finding of the Commission,[15] the majority of the Court of Appeals failed to give effect to a final order of the administrative tribunal—the Commission—in which Congress has vested exclusive jurisdiction of the subject matter. As Circuit Judge Rives points out in his dissent:

> "The weighing of public benefits against private injury could be done only by the Commission, and on that question the Commission found: 'That on the whole the benefit to the applicant and the public from

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[14]R. 90, citing *Western Pacific R. Co. v. Nevada-California-Oregon Ry.*, (N. D. Calif. 1930) 40 F. (2d) 731, and *Meacham v. Louisville & Nashville R. Co.*, (1943) 293 Ky. 642, 169 S.W. (2d) 830.

[15]We note, parenthetically, that the fact that the Commission made this crucially significant finding, of itself, presents the very issue left open in *Central New England Ry. Co. v. Boston & Albany R. R. Co.* (1929), 279 U.S. 415. In that decision, this Court held that a certificate did not ". . . operate *sub silentio* to release a carrier from a contract . . . ." (279 U.S. at 420).

the proposal will outweigh any injury which may be inflicted thereby on the protesting railroads.'

* * *

"When GM&O's private contractual obligation to I.C. came to conflict with its public duty to the extent, as found by the Commission, that the benefit to the public outweighed '*any injury* which *may be* inflicted thereby on the protesting railroad', . . . it seems to me that the private obligation ceased to exist." (R. 478, 479; Appendix A, pp 45, 46, below.)

Since the majority opinion ignores the relevant, and decisive finding of the Commission, this Court should review the judgment below.

3. The majority opinion below erroneously fails to give effect to the ultimate finding of the Commission that:

> "When and if operations [over L&N] are begun pursuant to authorization in the foregoing proceeding, there no longer would be need for the continuance of service by the applicant over lines of the Illinois Central and Southern between Ruslor and Birmingham. Accordingly, further operation by the applicant over such lines would impose an unnecessary and undue burden upon the applicant and upon interstate commerce." (R. 103; 282 I.C.C. at 340)

As Circuit Judge Rives points out in his dissent, entirely apart from the intent of the Commission expressed in its major finding No. 8, the ultimate finding last quoted above requires a decision that GM&O's obligation to pay rent is abrogated. Judge Rives concisely states the principle as follows:

> ". . . [the Commission's] certificate, similar to the judgment of a court, should control in determining what action the Commission took . . . it actually permitted abandonment of operation over the I.C. line conditioned only on the prior commencement of op-

eration over the L&N line. It seems to me that when the Commission thus permitted abandonment of operation over the I.C. line, that order carried with it all of the burdens of operation, including the very substantial burden of its obligation to pay rental and taxes to I.C.

* * *

". . . Surely by making a private contract for a perpetual lease, GM&O and I.C. could not remove that burden of operation over I.C.'s line from the jurisdiction of the Interstate Commerce Commission." (R. 478, 479; Appendix A, pp. 45, 46, below.)

This Court has never decided or been presented with the precise question here presented, i.e., the effect of Section 1 (18) and the provisions of the National Transportation Policy upon a rental obligation under a trackage contract made prior to 1920, where the Commission has authorized the abandonment of operation under that contract. It appears that the majority below considered that this case is governed by this Court's decision in *Central New England Ry. Co. v. Boston & Albany R. R. Co.* (1929), 279 U. S. 415.[16] But in so holding, the majority overlook the facts that in *Central New England* "no permission was requested or granted for abandonment by New England of operations over the Boston & Albany line", and that "Boston & Albany was not even a party to the proceeding before the Commission, nor was it given an opportunity to be heard" —again as pointed out by Judge Rives in his dissent.[17]

The prevailing opinion below fails to give effect to the over-riding policy and objectives of the Act, and specifically fails to accord to the Congressional declaration of "National Transportation Policy" the determinative effect required by its provisions. In the language of Circuit Judge Rives:

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[16]See R. 464-465; Apendix A, pp. 31-32, below.

[17]R. 480; Appendix A, p. 47, below. As is pointed out in footnote 15, at page 10, above, these facts are of compelling significance in view of finding No. 8, which raises issues not involved or considered in the *Central New England* case.

"It seems to me that the paramount public duty rests upon the carrier to render the safest, most adequate, economical and efficient service that lies reasonably within its power. It does not seem to me to be a 'sound economic condition in transportation and among the several carriers' . . . that one carrier should be held bound by a contract to pay perpetually to another rents and taxes on a line of railroad, which by order of the Interstate Commerce Commission the renting carrier has been permitted to abandon and has abandoned." (R. 476; Appendix A, p. 43)

* * *

"It seems to me that the holding of the majority implies a restrictive and unjustifiable construction of the Commission's authority under Section 1 (18) . . . contrary to the liberal construction required by the National Transportation Policy . . . ." (R. 480; Appendix A, p. 47)

The majority opinion erroneously restricts the authority and effect of a certificate of the Commission, and does so in reliance upon a decision of this Court which the majority clearly misunderstood and improperly applied. This Court should grant review to remove the confusion and to clarify the extent of the authority of the Commission in respect of trackage contracts entered into prior to 1920—an area which, as we have shown, is of country-wide, vital importance to the national transportation system.

4. The rental provision in Article 7 of the 1906 Contract requires GM&O to pay an annual rent "equal to two (2) per cent of the value of that part of the railroad of . . . [I.C.] *used* hereunder . . ." (Emphasis supplied) (R. 35). This provision, standing alone, clearly imports a promise to pay only to the extent used, and hence no liability for payment of rent under this provision arises in the absence of use. The majority opinion below held, however, that "used hereunder" means "permitted to be used" because the contract also imposed upon GM&O the obligation to

use. (R. 467-468; Appendix A, pp. 34-35, below). But I.C. has conceded in its briefs filed below that GM&O's contractual obligation to use was extinguished by the Commission's certificate; and absent such a concession, the decision of this Court in *Colorado* v. *United States* (1926), 271 U.S. 153, requires a holding that the contractual obligation to use was extinguished. The majority opinion below erroneously fails to attach any significance to the fact that the certificate of the Commission extinguished the inconsistent contractual obligation to use, and hence the majority failed to recognize the controlling effect of this Court's decision in *Colorado* v. *United States*.

Furthermore, the majority opinion below omits to apply the rule enunciated by this Court in *Texas & Pacific Ry. Co.* v. *City of Marshall* (1890), 136 U.S. 393, 402, that an extraordinary, perpetual obligation should be "acknowledged in words which admitted of no controversy". Clearly an obligation to pay rent in perpetuity after a lawful abandonment of use is such an extraordinary obligation as to require application of that rule.[18] In the *City of Marshall* decision, this Court further held that a perpetual obligation which obstructs improvements and changes which might be in the public interest, and which is a hindrance in the way of changes and improvements necessary for the advantage of the railroad and of the community which it serves, is such that ". . . we must look the whole

[18]The Federal policy against a contractual obligation to pay rent in perpetuity after lawful abandonment of use in the public interest is clear. Thus, even prior to 1920, it was held that a contract is void which disenables a railroad from performing its public duties, or removes the incentive to perform them, or makes it in the railroad's interest not to perform them. See *Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, (C.C.A. 8th, 1894), 61 Fed. 993, 997. The enactment of the Transportation Acts of 1920 and 1940, and especially the adoption in 1940 of the Congressional declaration of National Transportation Policy which precedes Section 1 of the Act, reinforces and emphasizes that policy. See Judge Rives' comments, R. 476, 478-480; Appendix A, pp. 43, 45-47. And the Commission, in *Construction of Lines in Eastern Oregon* (1927), 124 I.C.C. 529, 533, in applying the policy of the Interstate Commerce Act, stated that a 999-year trackage agreement, by its very nature, will contain provisions which, with the passage of time, probably will become "wholly obnoxious from the standpoint of public policy", and that such an agreement cannot guard against unforseen necessary readjustments "where the public interest and a developing territory are involved."

contract over critically before we decide that it bears such an imperative and such a remarkable meaning".[19] The majority opinion below fails to give effect to such a presumption against perpetual obligations, and relies on the very obligation to use which concededly has been extinguished by the certificate of the Commission. The majority opinion below, in critically important respects, thus fails to give effect to the decisions of this Court.[20]

5. The majority opinion below holds,

> "Notwithstanding appellant's effort to depict itself as being legally required constantly to seek out new plans and arrangements that might better serve the shipping and travelling public, we know of no rule of law that makes such duty paramount or superior to the duty to carry out its solemnly made contracts." (R. 469; Appendix A, p. 36, below.)

Circuit Judge Rives vigorously disagreed, quoting from *Norman* v. *B. & O. R. Co.* (1935), 294 U.S. 240, 307, 308. (See R. 480; Appendix A, p. 47, below.) The majority holding is directly in conflict with the decisions of this Court that interstate railroads *do* have such a Federal duty and that such duty is paramount over all other obligations, including contractual obligations. See *Colorado* v. *United States,* (1926), 271 U.S. 153, 163, 165; *Texas* v. *United States* (1934), 292 U.S. 522, 535.[21]

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[19]See 136 U.S. at 402-403.

[20]See also *Union Pacific Ry. Co. v. Chicago, R. I. & P. R. Co.* (1896), 163 U.S. 564, 590-591; *Cf. Freeport Sulphur Co. v. Aetna Life Ins. Co.,* (C.A. 5th, 1953), 206 F. 2d 5.

[21]The holding of the majority that the Federal duty is *not* paramount was made in response to GM&O's contention that the Federal duty overrode GM&O's obligation to I.C., if any, arising under the 1906 Contract, not to file its application with the Commission for authority to abandon use of I.C.'s railroad. (R. 469, 471; Appendix A, pp. 36, 38, below). Before enactment of the Transportation Acts of 1920 and 1940, this Court had held that a contractual provision by which a railroad agrees not to perform a duty it owes to the public is void. See *Gibbs v. Consolidated Gas Company of Baltimore City,* (1889), 130 U.S. 396; *Thomas v. West Jersey R. Co.* (1880), 101 U.S. 71, 83. Since the Commission's Order and Certificate conclusively establish that the abandonment was in the public interest, it necessarily follows that GM&O acted in furtherance of the public interest in filing its application for authority to abandon. It necessarily follows also that, if the 1906 Contract be construed to impose upon GM&O an obligation not to file that application, then the 1906 Contract to that extent is void, and that the majority opinion below is clearly erroneous.

The opinion of the majority below predicates its decision rejecting both the defense relating to the construction of the contract and the defense relating to the failure of consideration on its holding that private contractual obligations are not subordinate to the Federal duty. Thus, the majority opinion makes the holding in question a principal basis for its decision on the construction of the contract (See R. 468-469; Appendix A, pp. 35-36, below); and the majority opinion refers to its holding that the Federal duty is *not* paramount, as answering "to a considerable degree" our defense relating to failure of consideration (See R. 470; Appendix A, p. 37, below), and later elaborates upon that holding at length (See R. 470-472; Appendix A, pp. 37-39, below).

The majority opinion below implicitly recognizes that, after the abandonment, GM&O does not and cannot legally enjoy the right to use I.C.'s railroad and that I.C. does not and cannot legally tender that right. That conclusion is inescapable since a resumption of such use by GM&O would constitute a penal offense upon the part of both parties.[22] The majority's rejection of the defense of failure of consideration based upon these facts is rested primarily upon the erroneous conception that a railroad's "duty to carry out its solemnly made contracts" is paramount to its Federal duty to apply to the Commission for authority to effect improvements in the economy and efficiency of its service, and to act in accordance with that authority when granted.

Thus, while the majority below hold that "the consideration has not failed", it also finds that the promise to pay rent was based "partly on the . . . right to use I.C.'s railroad", and on I.C.'s obligation "to make . . . [that trackage] available for the exercise of the granted right". The majority concede that the latter consideration *has failed.* (R. 470; Appendix A, p. 37, below). And the majority

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[22]Sections 1 (20), 5 (4), 5 (8), 10 and 41 of the Interstate Commerce Act.

opinion, by dealing at length with the question whether GM&O acted in discharge of a Federal duty, seems to recognize that the partial failure of consideration was a material failure. But the majority opinion ignores the fact that the defense of failure of consideration clearly is well taken if the consideration has failed in material respects, even though a part of the consideration has not failed. In that event, GM&O may be liable to I.C. by way of and in terms of restitution—i.e., for the performance in fact received from I.C., if any. See 6 *Williston on Contracts,* Section 1974; 6 *Corbin on Contracts,* Section 1370; *New York Central & Hudson River R. Co.* v. *Gray* (1916), 239 U.S. 583.

Circuit Judge Rives correctly states the rule: ". . . the paramount public duty rests upon the carrier to render the safest, most adequate, economical and efficient service that lies reasonably within its power". (R. 476; Appendix A, p. 43) The majority opinion holds that that duty is subordinate to obligations assumed under private contracts. In so holding, the majority opinion is in conflict with the decisions of this Court in *Colorado* v. *United States*[23] and in *Texas v. United States.*[24] This Court should therefore grant review.

6. The majority opinion rejects GM&O's defenses based on construction of the contract and on failure of consideration, saying that "even though a mandatory directive from a governmental agency acting within the scope of its powers and not initiated by the party to be benefitted might in some circumstances excuse what would otherwise be a breach of contract, such is far from the situation here". (R. 469; Appendix A, p. 36, below). In so holding, the majority opinion is not compatible with the decision of this Court in *Transit Commission v. United States* (1933), 289 U.S. 121, 128, wherein this Court held that by Sections 1(18)-1(20) of the Interstate Commerce Act, Congress "intended to confer upon the Commission plenary power

[23] (1926) 271 U.S. 153, 163, 165.
[24] (1934) 292 U.S. 522, 535.

to limit interstate carriers' expenditures for . . . operation to lines . . . reasonably necessary for the service to the public", and that Section 1 (18) "is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate".[25]

Circuit Judge Rives in his dissenting opinion emphasizes the significance in this aspect of the addition to the Act of the Congressional declaration of the National Transportation Policy made by the Transportation Act of 1940. Judge Rives said: "It does not seem to me to be a 'sound economic condition in transportation and among the several carriers'[26] that one carrier should be held bound by a contract to pay perpetually to another rents and taxes on a line of railroad, which by order of the Interstate Commerce Commission the renting carrier has been permitted to abandon and has abandoned." (R. 476; Appendix A, p. 43, below).

7. One of the grounds upon which the majority of the Court of Appeals affirmed the decree of the District Court was that the public has no interest in the rental obligations of an interstate railroad to another interstate railroad under a trackage contract. (R. 463, 472; Appendix A, pp. 30, 39) But in *Transit Commission* v. *United States*,[27] this Court held that the public does have a vital interest in rental obligations within the exclusive jurisdiction of the Commission—that they be neither "inadequate nor extortionate".[28] That decision was reaffirmed in *Thompson, Trustee* v. *Texas Mexican Ry. Co.* (1942), 328 U.S. 134, at 148. In this case continued payment of rental would be for nothing currently received in return.

[25]See also *Western Pacific v. Nevada-California-Oregon Railway Co.*, (N.D. Calif., 1930) 40 F. 2d 731, 733; *Meacham v. L & N R. Co.* (1943), 293 Ky. 642, 169 SW 2d 830.

[26]Quoted from the Congressional declaration of National Transportation Policy. See Appendix D, page 51, below. That declaration clearly was added to require that all of the provisions of the Act be so administered and enforced as to give effect to the National Transportation Policy. See Congressional Record, July 24, 1939, pp. 9861-9862.

[27](1933), 289 U.S. 121, affirming the Commission's decision in *Long Island R. Co. Trackage*, 162 I.C.C. 218. See 162 I.C.C. at 219.

[28]See 289 U.S. 121, at 127-128.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CARL FOX

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CERTIFICATE OF SERVICE

I hereby certify that I have this date delivered three copies of the foregoing petition to Honorable D. K. McKamy, Attorney for Respondent.

This 3rd day of November, 1955.

.....

B. A. MONAGHAN

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15452

GULF, MOBILE AND OHIO RAILROAD COMPANY
Appellant,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama

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(August 18, 1955.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: This appeal is from a judgment of the District Court for the Northern District of Alabama denying appellant, Gulf, Mobile & Ohio Railroad Company, a decree terminating its contractual obligation to pay annual rental during the corporate life of GM&O and

of the Illinois Central Railroad Company to the latter company for trackage rights because GM&O had obtained from the Interstate Commerce Commission permission to abandon the use of the route over the tracks in question.

The contract in issue was signed by the parties or their predecessors or subsidiaries in 1906.[1] It provided that the Illinois Central subsidiaries would construct a certain line of railroad approximately 80 miles in length connecting Ruslor, Mississippi, and Haleyville, Alabama,[2] which would permit I.C. to have a line into Birmingham by obtaining from appellant's predecessor the right to use their tracks jointly for approximately 50 miles; the contract further provided that each of the parties as grantor granted to the other as grantee these correlative rights to use the specified trackage jointly, and each of the parties as grantee agreed in paragraph 7 of the contract as follows:

> "7. The Central Company and the Mobile Company respectively, accepts the grants made to it by the other parties hereto in the preceding articles of this agreement, and covenants and agrees that it will make use of the rights and

1 The parties are both guarantors of the contracts. The names of the parties and of their privies will be used interchangeably in this opinion. Abbreviations will also be used where appropriate.

2 Much of appellant's argument goes to the proposition that the agreement of the Illinois Central subsidiaries that they would construct this Ruslor-Haleyville line was no part of the consideration for the undertakings of appellant to pay the annual rent, appellant claiming that the contract remained wholly executory. The argument was advanced that Illinois-Central desired to build the line in question in order to reach the City of Birmingham, and that it would have done so whether or not appellant had obligated itself to the payment of rent for the life of the contract. Nevertheless the contract did expressly provide that "[Illinois-Central subsidiaries] hereby agree to construct a railroad connection etc." as one of the undertakings in the contract. It appears that the cost of construction approximated $4,000,000.00.

privileges therein granted upon the terms and conditions in this agreement expressed, during the term hereinafter limited, and that for the right to use as provided in this agreement, those parts of the railroads above described, including the facilities and appurtenances mentioned, it will pay the grantor company an annual rent which shall be equal to two (2) per cent, of the value of that part of the railroad of the grantor company used hereunder; and also one-half of all taxes, assessments and governmental charges payable, assessable, or property chargeable thereon, whether under general or special assessment, and if under general assessment, then one-half of the part fairly apportionable to the tracks and appurtenances in question. The values of those parts of the railroads used jointly hereunder, shall be fixed by agreement between the parties hereto, and if they shall be unable to agree, by arbitration in the manner hereinafter provided. The said rents and taxes shall be paid to the grantor companies respectively, in equal monthly installments at the end of each month during the term of this agreement, at their respective chief offices, in gold coin of the United States of the present standard of weight and fineness."

Paragraph 8 of the contract also provided for payment by each grantee to the grantor company of "such proportion of the monthly expenses incurred by the grantor company for the purposes mentioned in this Article (general maintenance and operating costs and certain insurance charges) as the mileage of cars and engines in the service of the grantee company on the said tracks of the grantor company, shall

bear to the total engine and car mileage thereon during the same month."

The two railroad companies used the two lines jointly from the date of completion of the Ruslor-Haleyville line by Illinois-Central continually and profitably until April 22, 1952. Illinois Central still continues to use the GM&O tracks for the use of which it paid annually to GM&O rent and taxes for the ten years, 1942 through 1951, a sum which averaged $56,218.79 per year under the provisions of Paragraph 7. During the same period appellant paid to Illinois Central an average payment of $136,796.72. In 1949 it amounted to $149,000.

Appellant abandoned the use of the Ruslor-Haleyville line on April 22, 1952. Appellant has not since made any payment of rent or taxes under the contract. This abandonment coincided with the commencement of the use of a new line which permitted it to enter Birmingham by cutting down substantially the use of tracks other than its own. This was made possible by a contract which GM&O entered into with the Louisville & Nashville Railroad Company, and by appropriate certificates of convenience and necessity issued by the Interstate Commerce Commission.[3]

The application for authority to abandon the Ruslor-Haleyville trackage of I.C. in favor of a route running from Ruslor to Tuscaloosa and Birmingham involving use of the

[3] "FINANCE DOCKET NO. 16989
"GULF, MOBILE & OHIO RAILROAD COMPANY ABANDONMENT
"FINANCE DOCKET NO. 16990
"GULF, MOBILE & OHIO RAILROAD COMPANY TRACKAGE RIGHTS."

L & N tracks just referred to, was filed by GM&O in March 1950. This application sought a certificate of public convenience and necessity permitting t e abandonment of operations over the I.C. lines and sought a certificate of public convenience and necessity permitting appellant to operate under trackage rights over the lines of L&N from Tuscaloosa to Birmingham. For the use of this track and facilities, appellant agreed to pay L&N an annual rental of $125,000.00, plus the usual user basis portion of 5% per annum on the cost of additions and betterments made to the jointly used property, and of the taxes, assessments and other governmental charges against the property. The application also sought a finding and determination "that upon the ceasing of operations by Applicant over the tracks of Illinois Central Railroad Company between Ruslor, Mississippi and Haleyville, Alabama, under the said contract of January 16, 1906, as supplemented, any further payments by Applicant to Illinois Central Railroad Company under said contract would not be consistent with the public interest."

The Illinois Central intervened in the proceedings before the Commission and resisted the application as a whole, and, of course, particularly that part of the application that the Commission relieve the appellant of its contractual obligations for the payment of rent.

The Commission issued a certificate of public convenience and necessity granting plaintiff's application to abandon, and, subject to modification of the annual rental from $125,000 to $100,000, granted its application for authority

to operate under trackage rights over the L&N lines from Tuscaloosa to Birmingham. The Commission ruled that it had no power to reform contracts or to relieve carriers of their financial obligations thereunder in connection with an application to abandon.

It, therefore, declined to pass upon the question as to the meaning of paragraph 7 or as to its continued vitality following abandonment.[4]

The refusal of the Commission to include a finding and determination that no further rental payments should be made to Illinois Central following the effective date of the abandonment order, left the parties at odds as to their

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4 The Commission devoted 9 pages of its 50-page report to a discussion of the power of the Commission over contracts. In the course of this discussion the report said:

> "Regardless of what may be the scope of our power to reform under section 5(9) trackage agreements which have been approved by us under section 5(2) and the parties thus placed on notice of our continuing power in the premises, we are of the opinion that we are not authorized by order to declare that the obligations created by the contract between the applicant and the Illinois Central are set aside other than to the extent necessary to effect a compliance with our certificates. Neither what the Supreme Court has held, what Congress has written, nor what the latter has implied by the purpose underlying what it has written, persuade us that a power which we have so vigorously disclaimed we must now exercise."

It is significant in considering the contention of the appellant that a continuance of the payments to Illinois Central would somehow be an undue burden on GM&O and on interstate commerce, that the Commission found that, assuming the continued payments of the sum of $149,000, which was the rental figure for the year 1949, and assuming the correctness of other adjustments of $70,500 contended for by intervenors, "there would still be a financial advantage to the applicant by use of the proposed line for handling its present traffic amounting to $80,500 annually." The Commission thus found that even though required to continue payments under the 1906 contract, GM&O would be better off financially under the new proposal. The Commission made no findings as to whether the making of the payments in the future would constitute an undue burden on interstate commerce or that such payments "would not be consistent with the public interest." In its general findings the Commission dealt with contentions and requested findings not specifically discussed in the following language: "Contentions of the parties or requested findings as to fact or law not specifically discussed herein, have been given consideration and are found to be without material significance or not justified."

rights and obligations for the payment of rent and taxes under Paragraph 7 of the 1906 contract. Illinois Central made no claim for the payments provided for in paragraph 8, since these were based upon a car mileage computation, but Illinois Central insisted that the obligation to make the annual rental and tax payments under Paragraph 7 was unaffected by the abandonment or by the certficate authorizing abandonment.

In this state of affairs, GM&O filed its suit for declaratory judgment. Its contentions, as set out in the brief filed in this court, are as follows:

> "First: The Court should apply the law to the findings, including the basic findings by the Commission that there is no longer any need for the Ruslor-Birmingham operation and that continued operation would be an undue burden on GM&O and on interstate commerce, and should adjudge that any obligation of GM&O to continue to make payments is extinguished.
>
> "Second: The terms of the contract do not include any promise by GM&O to pay rent (as distinguished from damages for breach of its promise to use) after a total cessation of use. GM&O, having made no such promise, cannot be held liable for payment of rent accruing after its lawful abandonment of use. All concede that GM&O has not breached its promise to use, since it acted under the authority of the Commission's Certificate, and hence that GM&O is not liable in damages for a breach of that promise.
>
> "Third: GM&O promised to pay rent in consideration of the right to use I.C.'s railroad. That

> right has been destroyed without GM&O's fault, and I.C. cannot lawfully permit GM&O to use its railroad. Hence there has been a failure of consideration which excuses GM&O's failure to pay rent after abandonment of use."

The trial court, in a full and well reasoned opinion, concluded that neither the abandonment of the line nor the certificate authorizing its abandonment terminated the obligation of appellant to pay the annual rent and taxes specified in Paragraph 7 of the contract.[5]

We shall consider the above three contentions in the same order in which they are urged by appellant.

I.

Appellant's contention that continued operation of the Ruslor-Birmingham line would be an undue burden on GM&O and on interstate commerce, and hence any obligation of GM&O to continue to make payments is extinguished.

Although stated as a contention complete in itself, this proposition is a non-sequitur, as is immediately apparent, since it does not state that the Commission found that the payments by GM&O in the absence of use would be an undue burden on it or on interstate commerce. To make this contention meaningful, it would have to be stated as follows:

The Commission found that continued operation of the Ruslor-Birmingham line would be an undue burden, and

5 Gulf, Mobile & Ohio R. R. Co. v. Illinois Central R. R. Co., 128 F. Supp. 311.

therefore not in the public interest; that payment by GM&O for the privilege of using the line in the absence of its actual use, would likewise constitute an undue burden on GM&O and not be in the public interest; that, therefore, the decision by the Commission authorizing the termination of the use of the line necessarily resulted in a termination of the obligation to make payments.

There are several criticisms of this reasoning. The first and foremost is that the Commission, although urged by appellant to do so, declined to make a finding that payment without use would be an undue burden on GM&O and on interstate commerce. The fact of the matter is that the Commission found in effect that payment without use would not be an undue burden on GM&O, since it stated specifically that the proposed new route would be profitable to GM&O even if it was required to continue making payments to Illinois Central on the abandoned line.

A further criticism of this restated proposition is that it seems to be predicated upon the assumption that the payment by GM&O for unused privileges would *ipso facto* amount to an undue burden on interstate commerce; whereas the truth is, since both parties to the contract are Class I carriers, and the loss suffered by one represents a gain enjoyed by the other, no such assumption is permissible. Certainly this court cannot say that the net benefit to the shipping public would be greater if the Illinois Central took the loss of $149,000 in annual rental than if GM&O continued to pay it. As stated above, the Commission declined to make such finding. Convinced that the Commis-

sion properly declined to do so, we are unimpressed with the contention that we should do so.

Appellant's brief, apparently seeking to bridge a gap in its effort to demonstrate that the continued payments are in conflict with, and are therefore nullified by, the Commission's certificate authorizing the abandonment of the old line, seeks mightily to give the impression that the Commission's finding of undue burden in the event of continued operation, also amounted to a finding that the payment of rent without use constituted such a burden. Without proceeding through any logical process of reasoning to persuade us that this is true, appellant simply treats the certificate as standing for this proposition.

We agree with the statement of the trial court to the effect that "the only contractual obligations with which either Congress or the Commission has any concern are those which affect the public interest by imposing burdens on interstate commerce," and further that "the right of service to the public is not herein involved."[6]

These statements by the trial court are criticized by appellant as being "a denial of the Commission's major findings," citing particularly Findings 1, 3 and 5. These findings respectively found that the *proposed abandonment and substitution of the new line* would promote efficiency and economy, improvement in service and increased adequacy of facilities in reaching new markets. Not one of them had to do with the effect of the *payment of the stipulated* rent after abandonment. There is thus no inconsistency between the trial court's statements and the

6 Gulf, Mobile & Ohio R. R. Co. v. Illinois Central R. R. Co., 128 F. Supp. 311, 321.

"major findings" of the Commission. The trial court's position in this respect is fully supported by *Central New England Rwy. Co. v. Boston & Albany R. R. Co.*, 279 U. S. 415, 49 S.Ct. 358, 73 L.Ed. 770, and *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363.

In the Central New England Railroad case the parties had entered into a contract under the terms of which Central New England acquired trackage rights over 4.05 miles of the Boston & Albany lines, and which it could use only if it ran its trains over a connecting link of 1.87 miles of its own railroad between Feeding Hills and Agawarn. It agreed to pay $15,000 per year until 1940 for these trackage rights. In 1921 it applied for and got a certificate from the Interstate Commerce Commission authorizing it to abandon operations over the 1.87 miles. This, of course, made impossible its use of the B&A trackage. It sought in the state court to obtain relief from the annual payment under the contract. The contention of Central New England there as of GM&O here, was that the effect of the certificate was to relieve it of making payments for a use which it couldn't enjoy. The Supreme Court rejected the contention basing its opinion on the proposition that, without passing on the *power* of the Commission to abrogate existing contracts with respect to an abandoned line, an order authorizing an abandonment would not have the effect of abrogating such a contract if the order did not purport to do so.[7] The Court expressly rejected the contention that the policy of the Interstate Commerce Act achieved this result, even though no such action was taken by the Commis-

[7] The order of the Commission here expressly pretermitted a decision as to the effect of its certificate upon the contract in question.

sion.[8] There is no conflict between the order of the Commission authorizing abandonment here and the continuation of payments under the contract any more than there was in the Central New England case. Where there is none, the Supreme Court says the order will not be a basis for relieving a party to the contract of its contractual obligations.

Although the Regents case, *supra,* is not a railroad case, the reasoning of the Supreme Court in that case is quite apposite and is persuasive of the proposition that the licensing and regulatory powers granted to adminstrative bodies by Congress do not authorize the abrogation of or have the effect of abrogating, private contracts merley because such contract may, to a considerable degree, affect the results sought to be accomplished by the act of regulation or licensing.

We find that there is nothing in the Commission's findings or in its actions or in the voluntary abandonment by appellant that in any way affects whatever obligations to pay rent were contained in Paragraph 7 of the 1906 contract.

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8 The Court said in this connection: "To the suggestion of petitioner that, by force of the statute, the permission to abandon its line necessarily operated to cancel its obligation, regardless of the intention of the Commission, we need only say that the statute contains no such provision nor any language suggesting it. We need not decide whether such may be the effect of a proper order of the Commission on contracts previously entered into by the carrier and not expressly mentioned in the order, where the contract and the order necessarily conflict. See Colorado v. United States, 271 U. S. 153, 165; New York v. United States, 257 U. S. 591, 601; cf. New England Divisions Case, 261 U. S. 184. But without such a conflict, there could be no justification for holding that the order would also operate sub silentio to release a carrier from a contract merely because it has ceased to be of value through compliance with the order. This is especially the case where the other party to the contract is another common carrier with whose financial condition the Commission is equally concerned."

II.

Appellant's contention that the contract required payment of rent only so long as GM&O used the trackage and that therefore its abandonment of use under authorization by the Interstate Commerce Commission terminated any obligation to make payments as rent, and also excused GM&O from liability for damages for a breach of its agreement to continue to use the facilities.

This contention is plainly double-pronged. The first is that under the expressed language of the contract, rent was payable only so long as appellant used the trackage; the second is that if there was an expressed covenant by GM&O to *continue to use* the line during the life of the contract, its failure to carry out this agreement was excused by the issuance of the certificate by the Commission authorizing abandonment of the line.

The full text of Paragraph 7 is set out above. The significant language as respects the first part of this contention is as follows:

> ". . . . the Mobile Company . . . covenants and agrees that *it will make use of the rights and privileges therein granted* upon the terms and conditions of this agreement expressed *during the terms hereinafter limited,* and that for the *right to use* as provided in this agreement, *those parts of the railroads above described,* including the facilities and appurtenances mentioned, it *will pay* the

> grantor company *an annual rent which shall be equal to two* (2) *per cent, of the value of that part of the railroad of the grantor company used hereunder;* and also one-half of all taxes . . . *The said rents and taxes shall be paid to the grantor companies respectively, in equal monthly installments at the end of each month during the term of this agreement,* . . . "

Appellant contends that, although it bound itself to use the tracks for the full term of the contract, *i.e.*, for the life of the two corporations extended as long as the law allowed, and agreed to pay rent[9] annually in equal monthly installments during the term of the agreement, nevertheless if it violated its agreement to use the tracks the duty to pay rent as such would terminate because the amount of the rent was to be determined by the actual use, and that the claim thereafter against it would be for damages for breach of the covenant to use.

There are several fallacies in this reasoning. The first is in the significance which appellant seeks to place on the words "used hereunder," which appellant says limit the obligation to pay rent to those years in which the Mobile Company actually used the line. No such special significance can be attached to the word "used" in Paragraph 7 to indicate that the rent was to be computed only on that portion of the railroad actually *used* in any one year rather than on that portion of the railroad, which, under the contract, GM&O *bound itself to use*. It must be realized that when the parties signed the contract the obligation to pay was fixed and determined by the solemn agreement of

9 We use the terms rent as relating to rent and taxes, since the obligations are treated by both parties as being the same.

GM&O to use and pay for the life of the contract, and therefore it was entirely unimportant whether the property, the value of which was to be used as a basis for computing the rent, was described as "that part of the railroad of Illinois Central permitted to be used" or as "that part of the railroad of the Illinois Central used hereunder." This is so because obviously the parties did not have in mind any distinction between the words "used" and such words as "permitted to be used," because by the solemn obligation of the parties they meant one and the same thing.

We agree with the trial court that the words "used hereunder" were merely descriptive of the property, which, under the granting clause, appellant was privileged to, and agreed to, use for the life of the contract. It could not be considered as having the effect of nullifying the agreement of appellant to use and pay rent without right of termination. We think it would be entirely inconsistent with the clearly expressed intent of the parties to hold that the words "used hereunder" were intended to provide for the contingency that one or the other of the parties might fail to carry out its agreement to use entered into in the very same paragraph of the contract.

Having held, as we do, that there is no merit in appellant's first proposition under this phase of the case, that is that the contract required payment of rent only so long as it used the tracks, it is not necessary for us to consider the second proposition, that is that no damages for breach of contract to use would accrue because the breach was excused by the overriding effect of the certificate of abandonment. Nevertheless, we say that this argument fails to im-

press us, because even though a mandatory directive from a govenmental agency acting within the scope of its powers and not initiated by the party to be benefitted might in some circumstances excuse what would otherwise be a breach of contract, such is far from the situation here. Notwithstanding appellant's effort to depict itself as being legally required constantly to seek out new plans and arrangements that might better serve the shipping and travelling public, we know of no rule of law that makes such duty paramount or superior to the duty to carry out its solemnly made contracts. GM&O certainly owed no such duty to the public as would require it to seek relief from a burdensome payment for the benefit of its stockholders at the expense of the stockholders of the payee, when no segment of the public and no official of the regulatory agency was complaining or recommending relief from a transportation arrangement that was proving profitable to all concerned. Appellant's attempt to clothe its own efforts to achieve a substantial financial saving for itself with the mantle of public duty of the kind that overrides the obligation of a contract, is not persuasive. We find nothing in the Interstate Commerce Act or any of the decided cases that supports any such theory.[10]

III.

Appellant's contention that GM&O promised to pay rent in consideration of the right to use I.C.'s railroad; that that right has been destroyed without GM&O's fault;

10 The case of Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878, argued extensively by appellant, does not support its contention; nor do the lower court and state decisions.

hence there has been a failure of consideration which excuses GM&O's failure to pay rent after abandonment of use.

What we have already said answers to a considerable degree the several assertions here made. In the first place, the promise to pay rent was based only partly on the consideration of the right to use I.C.'s railroad. It was also based on the considertion of I.C.'s promise to construct the road, which it did at a cost of some four million dollars; and it was also based partially upon the corresponding promise of I.C. to use and pay for the use of some 50 miles of GM&O's tracks. All of these and other items were found by the trial court to be part of the consideration for GM&O's original promise. This finding by the court is amply supported by the record below. Thus, the consideration has not failed.[11]

Having held that there were other considertions to support the promise to continue payments for the life of the corporation, it is not necessary to discuss the contention that non-user by GM&O, however, occasioned, would have amounted to a failure of consideration if none other than the right to use were here present. However, as we have pointed out above, the non-user came about by action of appellant in seeking to improve its earnings by abandoning

[11] We think there is no merit in appellant's contention that the sole consideration "for the right to use" was the rents and tax payments. All of the mutual obligations of the parties are to be considered in any determination whether the consideration remains purely executory during the life of the contract. Surely the agreement to pay rent "for the right to use" was at least partially supported by the heavy obligation of the grantor to construct the line which it specifically agreed to do, and to make it available for the exercise of the granted right. We cannot separate the contract into (1) a voluntary promise of I.C. to build and (2) a grant of the "right to use" in consideration of the payment of rent on the tracks when actually used.

the route in question. This necessarily cast on I.C. a substantially higher cost for the operation of its trains over the 80 miles involved. Appellant says that the further burden of losing the annual rental payments must also be thrown on I.C. because it is the duty of GM&O to operate as economically and efficiently as possible in order to contribute to a reduction in rates.

This contention is obviously intended to answer appellee's argument that even if the certificate made future use impossible and thus worked a total lack of consideration, this would be no defense because of the principle that "where a party to a contract is the cause of the failure of performance of an obligation due him he cannot take advantage of the failure."[12] Appellant, in effect, says that even if the failure of performance was brought about by its act, it was forced into this action by its duty to the public. This line of argument seems to us to be specious. Viewed as a whole, it appears that the Interstate Commerce Commission granted the application for the new route and the application for abandonment of the old on the simple theory that even though all intercompany payments for trackage remained untouched, there would still be a net annual saving to the entire group of railroads here involved of $80,500. Such a saving was accompanied by certain additional advantages to the applicant and worked no serious disadvantage to the intervening roads. Therefore, it can be said that the public interest was served to the extent of additional earnings by the entire group of $80,500 per year. This is the figure that should be considered in determining the ultimate benefit to the public, because it is the figure

12 Selman v. Bryant, ... Ala. . . . . , 72 So. 2d 704.

that is to be taken into consideration in rate-making. It is quite apparent from the Commission's findings that the Commission might have taken quite a different view of the applications and that it might well have disapproved them if there had not been a net overall saving in the rearrangement *without disturbing the intercompany contracts.* It seems too clear for argument that I.C.'s ability to serve its shippers would be impaired to the extent its revenues are reduced; such impairment would be no more than compensated for, so far as the public interest is concerned, by a similar enhancement of appellant's ability to serve its shippers by the savings it would enjoy if the rental payments were cancelled. Thus, we agree with appellee that while there is a definite public interest in the shifting of the route designed to afford better service, there is no public interest in the question who is to stand the economic loss of the rental payments.[13]

We think this analysis properly applies the law as contemplated by Congress in the enactment of the Interstate Commerce Act of 1940.

IV. Measure of damages.

Appellant urges the further proposition that if we should find against its contention on the construction of the contract and its continued vitality, we should nevertheless hold that it is not under any obligation to continue to make rental payments as such, but it should be adjudged that there is a simple breach of the agreement to pay rent, and the

[13] "This is especially the case where the other party to the contract is another common carrier with whose financial condition the Commission is equally concerned." Central New England R. R. Co. v. Boston & Albany R. R. Co., 279 U.S. 415, 418, 49 S.Ct. 358, 73 L. Ed. 770.

trial court should have more clearly specified the measure of damages.

In its complaint for declaratory judgment, appellant prayed:

> "(a) That the Court declare what the rights and other legal relations of the Plaintiff will be under the said contract dated January 16, 1906, after Plaintiff abandons operations over the Defendant's said line of railroad, as aforesaid.
>
> "(b) That the Court adjudge that upon the abandoment by Plaintiff of opertions over the Defendant's line of railroad between Ruslor, Mississippi, and Haleyville, Alabama, pursuant to the aforesaid Order and Certificate of the Interstate Commerce Commission, the Plaintiff will stand relieved of liability to make any payment to the Defendant under sections 7, 8, 20 and 22 of the said contract dated January 16, 1906, except in respect of amounts due thereunder for Plaintiff's use of said line of railroad prior to such effective date of abandonment."

In its answer appellee prayed:

> "(a) That this Court will declare that the plaintiff is legally bound to the defendant in accordance with the terms of said contract dated January 16, 1906.
>
> "(b) That this Court is without authority to modify, amend or alter the order of the Interstate Commerce Commission heretofore made."

The pleadings were thus directed to the single question as to whether there remained a continuing liability for the payment of the items of rent and taxes as described in Paragraph 7,[14] after the effective date of the certificate of abandonment. Neither party on the trial below sought to present a case on which the trial court might make findings as to any payments that were then due under the contract. The trial court's judgment adhered strictly to the pleadings and to the proof in this regard. His judgment was:

> "That plaintiff is legally bound to the defendant under the contract of January 16, 1906, a copy of which was attached to the complaint in this proceeding as Exhibit 1, for the payment of rent and one-half the taxes, assessments and other charges, as provided in section 7 of said contract; . . . . "

In arriving at this judgment the court necessarily found that the "property" the value of which was the basis of the annual rental was that part of the Illinois Central Railroad that was the subject of the grant to GM&O. The identity of that property was sufficiently clear for the GM&O to use it without question for some 46 years, and it is not anticipated that there will be any difficulty in determining what it is or what its value is or what may be the "taxes, assessments and governmental charges thereon." The trial court did not anticipate any need further to interpret these provisions of the 1906 contract; nor do we. The time for that will be when and if such a question

[14] The parties by common consent seem to have abandoned any contentions as to provisions in Paragraphs 8, 20 and 22. The Court did not deal with them, and neither party presses them here.

actually arises upon presentation by I.C. of its annual bill for the payments which the trial court held, and which we find correctly held, are still the obligation of the grantee road. It would be unfruitful as well as inappropriate for us to attempt to prescribe the nature of the remedy of I.C. for the collection of the sums due under the contract, or to attempt to decide whether the future amounts are to be collected annually as they become due or in a single action for breach of contract. Neither should we pass on the question as to what matters of defense are available in any such action other than that dealt with in this opinion. These matters have not been presented to the trial court for its consideration and they, as well as any question as to the measure of damages, should first be passed upon by it on issues actually joined rather than by us in a vacuum.

In affirming the judgment of the trial court we do so without prejudice to either party to bring in question any issue except that which is expressly decided here, and which we understand the trial court to have decided below; that is that such obligation to pay rent and taxes as existed under paragraph 7 of the contract still exists unaffected by either the abandonment of the line by GM&O or any overriding public policy resulting from the action of the Interstate Commerce Commission.

The judgment is

AFFIRMED.

RIVES, Circuit Judge: I dissent.

RIVES, Circuit Judge, dissenting.

I respectfully dissent. It seems to me that the paramount public duty rests upon the carrier to render the safest, most adequate, economical and efficient service that lies reasonably within its power.[1] It does not seem to me to be a "sound economic condition in transportation and among the several carriers" (see footnote 1, *supra*) that one carrier should be held bound by a contract to pay perpetually to another rents and taxes on a line of railroad, which by order of the Interstate Commerce Commission the renting carrier has been permitted to abandon and has abandoned.

Paragraph 18 of Section 1 of the Interstate Commerce Act, 49 U.S.C.A. 1 (18),[2] authorizes the Commission to

---

1 That is, I think, implicit in the "National Transportation Policy" which precedes Section 1 of the Transportation Act of 1940, and is copied in the note at the beginning of Title 49, Chapter 1, U.S.C.A. pocket supplement:

"'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, *adequate, economical, and efficient service* and foster *sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*'" (Emphasis supplied.)

2 (18) *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present and future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall *abandon all or*

issue a certificate that the present or future public convenience and necessity permit the abandonment of all or any portion of a line of railroad, or the operation thereof. After a full and fair hearing to which both the lessor and lessee carriers were parties, the Commission issued its certificate that,

> "the present and future public convenience and necessity permit abandonment by the Gulf, Mobile and Ohio Railroad Company of operation under trackage rights over the line of the Illinois Central Railroad Company between Ruslor (Corinth), Miss., and Haleyville, Ala., * * * * * * *. Provided, however, and this certificate is issued upon the express condition that the operation under trackage rights herein permitted to be abandoned may not be abandoned until operation is commenced under trackage rights over the line of the Louisville & Nashville Railroad Company described herein."

Thereafter the Gulf, Mobile and Ohio commenced operation under trackage rights over the line of the Louisville & Nashville and abandoned operation under trackage rights of the line of Illinois Central.

The Commission disclaimed any jurisdiction to determine whether or not the rental contract between G.M.&O. and I.C. continued in force and effect, and left that task to the courts. Hence this suit.

---

any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that *the present or future public convenience and necessity permit of such abandonment.*" (Emphasis supplied.) 49 U.S.C.A. 1 (18).

Under Paragraph 18 of Section 1 of the Act (footnote 2, *supra*), the Commission had full jurisdiction to permit the abandonment of the line of railroad, "or the operation thereof," in whole or in part, and to attach to its order such lawful condition as it saw fit. My brothers say that "* * * the Commission found in effect that payment without use would not be an undue burden on G.M.&O." I do not think that the Commission's opinion is reasonably subject to any such construction, but if we differ as to the construction of its opinion, we cannot differ as to the meaning of its certificate issued pursuant to that opinion. That certificate, similar to the judgment of a court, should control in determining what action the Commission took. As appears from the pertinent part thereof, heretofore quoted, it actually permitted abandonment of operation over the I.C. line conditioned only on the prior commencement of operation over the L&N line. It seems to me that when the Commission thus permitted abandonment of operation over the I.C. line, that order carried with it all of the burdens of operation, including the very substantial burden of its obligation to pay rental and taxes to I.C.

The weighing of public benefits against private injury could be done only by the Commission, and on that question the Commission found: "That on the whole the benefit to the applicant and the public from the proposal will outweigh any injury which may be inflicted thereby on the protesting railroads."

Under the majority decision, it is difficult, if not impossible, to discover any method by which a carrier may be relieved of its obligation under a perpetual lease of op-

eration rights over another's line short of bankruptcy, forced liquidation or dissolution. In the present case, the Commission found that the switch to the lines of the L&N would effect some economy even if the GM&O had to continue its payment of rentals to I.C., though, of course, much greater economy would be effected if such payments ceased. In a case where the economies effected were not so large, would the Commission be powerless to permit the abandonment of that part of the burden of operation? When G.M.&O.'s private contractural obligation to I.C. came to conflict with its public duty to the extent, as found by the Commission, that the benefit to the public outweighed "*any injury* which *may be* inflicted thereby on the protesting railroad," (Emphasis supplied) it seems to me that the private obligation ceased to exist. See *Munn v. People of Illinois*, 94 U.S. 113, 125. I agree with the Court of Appeals of Kentucky that,

> "* * * while a railroad is a private corporation, yet it is a quasi public agency, and one contracting with it must have contemplated the fact that when public necessity and convenience required the abandonment of a particular part of its line, it would not be bound by a contract to operate that line in perpetuity." Meacham v. Louisville & N. R. Co., 169 S.W. 2d. 830, 832.

See, also *Western Pacific R. Co. v. Nevada-California-Oregon Ry.*, S.D. Cal., 40 F. 2d. 731, 733. Surely by making a private contract for a perpetual lease, G.M.&O. and I.C. could not remove that burden of operation over I.C.'s line from the jurisdiction of the Interstate Commerce Com-

mission. As said by Chief Justice Hughes, speaking for the Court in *Norman v. B. & O. R. Co.*, 294 U.S. 240, 307, 308:

> "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

It seems to me that the holding of the majority implies a restrictive and unjustifiable construction of the Commission's authority under Section 1 (18), footnote 2, *supra*, contrary to the liberal construction required by the National Transportation Policy, footnote 1, *supra*.

New England Ry. Co. v. Boston & Albany R.R. Co., 279 U.S. 415, 49 S.Ct. 358, 73 L. Ed. 770, and *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 70 S.Ct. 370, 94 L. Ed. 363, appear to me to be clearly inapplicable to the facts of this case. In *New England Ry. Co. v. Boston & Albany R.R. Co., supra*, no permission was requested or granted for abandonment by New England of operations over the Boston & Albany line. Boston & Albany was not even a party to the proceeding before the Commission, nor was it given an opportunity to be heard. As to *Regents of University System of Georgia v. Carroll, supra*, it seems to me that the provisions for regulation of radio broadcasting embodied in the Federal Communication Act differ radically from those for the regulation of common carriers in the Interstate Commerce Act. See *Federal Communicatins Act v. Sanders Brothers Radio Sta-*

tion, 309 U.S. 470, 474. Specifically, the Federal Communications Act contains no provision comparable to paragraph 18 of section 1 of the Interstate Commerce Act, footnote 2, *supra*, under the authority of which the Commission acted in this case. On the contrary, licensees for radio broadcasting need not renew their license, but may abandon operation without the consent of the Commission.

It seems to me, under the findings, order and certificate of the Interstate Commerce Commission, that upon G.M.&O.'s compliance therewith, any obligation of G.M.&O. to I.C. was extinguished. I, therefore, respectfully dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15452

GULF, MOBILE AND OHIO RAILROAD COMPANY,
Appellant

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee

JUDGMENT

Extract from the Minutes of August 18, 1955.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Gulf, Mobile and Ohio Railroad Company, and the surety on the appeal bond herein, The Travelers Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION
No. 6947

GULF, MOBILE AND OHIO RAILROAD COMPANY, a corporation,

Plaintiff,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation,

Defendant

DECLARATORY JUDGMENT
Filed January 7, 1955

This cause coming on for disposition upon the pleadings and evidence, and the Court having heard the arguments and considered the briefs of counsel, and having made and filed its opinion on December 30, 1954.

IT IS HEREBY DECLARED, ORDERED, ADJUDGED AND DECREED:

1. That the several findings made from the evidence and record by the Court in said opinion are adopted herein as the Court's findings of fact, and the conclusions of law stated in said opinion are adopted herein as the Court's conclusions of law, and said opinion is hereby made a part of this judgment and decree by reference;

2. That Plaintiff is legally bound to the Defendant under the contract of January 16, 1906, a copy of which was attached to the complaint in this proceeding as Exhibit 1, for the payment of rent and one-half the taxes, assessments and other charges, as provided in section 7 of said contract; and

3. That Defendant recover its costs in this action.

H. H. GROOMS,
United States District Judge

Dated: January 7, 1955

APPENDIX D

STATUTES INVOLVED

INTERSTATE COMMERCE ACT (49 U.S.C.A.):

National Transportation Policy:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1:

"(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier

by railroad subject to this chapter shall abandon all or an portion of a line of railroad, or the operation thereof, un less and until there shall first have been obtained from th commission a certificate that the present or future publi convenience and necessity permit of such abandonment Nothing in this paragraph or in section 5 shall be consider ed to prohibit the making of contracts between carriers b railroad subject to this chapter, without the approval of th Commission, for the joint ownership or joint use of spur industrial, team, switching, or side tracks."

Section 1:

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issu it for a portion or portions of a line of railroad, or exten sion thereof, described in the application, or for the partia exercise only of such right or privilege, and may attach t the issuance of the certificate such terms and conditions a in its judgment the public convenience and necessity ma require. From and after issuance of such certificate, an not before, the carrier by railroad may, without securin approval other than such certificate, comply with the term and conditions contained in or attached to the issuance o such certificate and proceed with the construction, opera tion, or abandonment covered thereby. Any construction operation, or abandonment contrary to the provisions o this paragraph or of paragraph (18) or (19) of this sectio may be enjoined by any court of competent jurisdiction a the suit of the United States, the Commission, any commis sion or regulating body of the State or States affected, o any party in interest; and any carrier which, or any directo officer, receiver, operating trustee, lessee, agent, or perso acting for or employed by such carrier, who knowingly au thorizes, consents to, or permits any violation of the prov sions of this paragraph or of paragraph (18) of this sectio shall upon conviction thereof be punished by a fine of no more than $5,000 or by imprisonment for not more tha three years, or both."

2/14

FILED
DEC 1 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 506

GULF, MOBILE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE ANTHONY-GARDNER PRINTING COMPANY, CHICAGO

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entry into Birmingham, Alabama, when permissive certificate of the Interstate Commerce Commission, allowing abandonment of operation but denying relief from the obligation to continue such payment, was granted upon the voluntary application of the Gulf, Mobile and Ohio Railroad Company?

STATEMENT OF FACTS.

Petitioner is here seeking to be relieved of the obligations of the contract entered into January 16, 1906, by seven railroad companies, one being the Mobile & Ohio Rail Road Company,* predecessor of petitioner. The contract was assumed by petitioner in 1940 (R. 139). It was by virtue of this contract, among others, that both M&O and IC gained access to the important traffic-producing center of Birmingham. By this contract IC agreed to, and did, build at a cost of over $4,000,000 (Stip. 9(a) and 12, R. 133 and 137) a segment of line approximately eighty miles in length between Ruslor, Mississippi, and Haleyville, Alabama. M&O agreed to use the said line (R. 35) and for its part agreed to make certain improvements in an existing line between Perry (Jackson), Tennessee, and Ruslor, Mississippi (R. 37). IC agreed to use that line (R. 35). Each railroad agreed to pay for the right to use the railroad of the other party an interest rental of 2 per cent, plus one-half the taxes (R. 35).

At foreclosure sale in 1940 petitioner purchased the properties of M&O and assumed the 1906 contract (R. 139, Stip. 14). Petitioner had no access to Birmingham until it assumed this contract (R. 137). Petitioner's operation

* All railroad companies mentioned in this brief are referred to by short titles as follows:
Gulf, Mobile and Ohio Railroad Company—GM&O.
Illinois Central Railroad Company—IC.
Mobile & Ohio Rail Road Company—M&O.
Louisville and Nashville Railroad Company—L&N.

over the contract route proved very profitable (R. 150, Stip. 25).

In 1950 petitioner voluntarily applied to the Interstate Commerce Commission for permission to abandon operation over respondent's line and to institute operations into Birmingham over a line of the L&N. In its application, petitioner prayed that the Commission find and determine that, upon the ceasing of operations by petitioner over respondent's line, any further payment by petitioner to respondent under the contract of January 16, 1906, would not be consistent with the public interest and further requested that the Commission attach as a part of the terms and conditions of its certificate of abandonment a condition that, upon petitioner's exercise of the authority therein conferred, petitioner cease making any further payment to respondent under the contract (R. 27). The executive vice-president of petitioner testified, however, that, even if petitioner were required to continue payments to respondent under the contract, it would nevertheless go through with the transfer of its operations to the L&N, if permitted by the Commission (R. 146).

The Commission, by Division 4, though granting permission to abandon *operation* over the contract route, denied petitioner's request to be relieved from rental payments, saying:

> "* * * we are of the opinion that we are not authorized by order to declare that the obligations created by the contract between the applicant and the Illinois Central are set aside other than to the extent necessary to effect a compliance with our certificate." (R. 94; 282 I. C. C. at 335.)

In permitting petitioner to abandon operation over the line of respondent and to institute operation over the line of the L&N, Division 4 found:

> "That the change in operation proposed will be of advantage to the applicant even though it may be required to continue payment to the Illinois Central under its contract." (R. 100; 282 I. C. C. at 339.)

Petitioner did not seek reconsideration by the full Commission of the report or certificate and order of Division 4, and the said certificate and order became final in accordance with its terms. Nor did petitioner challenge, in a statutory three-judge court, the Commission's refusal to relieve petitioner of its obligation to pay rent and taxes under the contract.

After this suit was filed, the parties entered into a stipulation that, without prejudice to the rights of either party, bills against the GM&O would be deferred until a final decision in this case. Respondent, however, continues under the 1906 contract to use the line of petitioner between Perry (Jackson), Tenn., and Ruslor, Miss., and pays petitioner a substantial sum each year for this privilege. During the first full year after abandonment of operation by GM&O, IC paid GM&O $352,612.69 for the use of the Perry-Ruslor segment under the 1906 contract (R. 151).

In the present declaratory judgment action instituted by petitioner, the District Court held that petitioner's contractual obligation to pay rent and taxes does not conflict with the Commission's order permitting abandonment (R. 424; 128 F. Supp. at 321). The District Court declined to hold that the legal effect of the order was to extinguish petitioner's obligation to make such payment (R. 434; 128 F. Supp. at 325).

On appeal the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. There Is No Conflict in the Decisions. The Holdings of the District Court and the Court of Appeals Are Clearly in Accord with the Applicable Decisions of This Court.

Does a permissive order of the Interstate Commerce Commission allowing petitioner to abandon operation over a line of respondent impliedly relieve petitioner of a private contractual obligation to continue payment of the agreed rental and taxes notwithstanding a denial by the Commission of such relief?

This question must be answered in the light of the following undisputed facts found in the record:

1. Petitioner in the abandonment proceeding asked the Commission to grant relief from its contractual obligation to pay rent and taxes (R. 27). The Commission refused to grant the relief saying it was without authority to do so, obviously for the very good reason there was no public interest in the controversy over which road should have the money—the Commission being equally interested in the welfare of both railroads—and the public having no conceivable interest in which road should bear the burden in this case (R. 94).

2. The Commission has exclusive jurisdiction in abandonment proceedings. It could attach to its certificate only such conditions as would be "in the public interest." No public interest beyond the mere abandonment of *operation* was involved and the Commission said it was not authorized to set aside the 1906 contract except to the extent necessary to effect a compliance with its certificate (R. 94).

3. The contract contains a specific provision (Article 7) requiring GM&O to continue making payments of its share

of interest rental and taxes on the trackage built by the IC for joint use as an entry into Birmingham. The payments provided for in the contract are for "the right to use," not for actual use (R. 35), and were to be made "* * * at the end of each month during the term of this agreement * * *" (R. 35).

4. The Commission found even if GM&O continues to pay its contractual share of interest rental and taxes on the IC segment over which it abandoned operation, it will still earn a greater profit on its Birmingham business than it formerly did (R. 100). There is, therefore, no burden on commerce. The sole responsibility for the change was assumed by the GM&O under the terms of the contract. It was under no compulsion to abandon a profitable operation, but elected to do so on a permissive order.

Every decision on which petitioner professes to rely merely holds that the power of the Commission to permit abandonment of operation is paramount and exclusive. This, of course, is true. Not only is it admitted, but it is urged as the very reason why the decision of the lower courts is correct. Whether abandonment of *operation* is in the public interest is certainly an administrative question for the Commission to decide. So, too, is the power of the Commission to prescribe what conditions are required in the public interest, paramount and exclusive. There is no decision cited and none can be found holding that a court, not the Commission, can prescribe a condition to be incorporated in the order permitting abandonment. And neither a court nor the Commission can find that any public interest is promoted by requiring the burden of making the change to be borne, not by the carrier electing to make it, not by the carrier which has by solemn contract obligated itself to bear it, but by another carrier which is in no way to blame for the position in which petitioner voluntarily placed itself.

Both the District Court and the Court of Appeals correctly relied on the decision of this Court in *Central New England Ry. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415, as controlling the disposition of that question. There, this Court said:

> "To the suggestion of petitioner that, by force of the statute, the permission to abandon its line necessarily operated to cancel its obligation, regardless of the intention of the Commission, we need only say that the statute contains no such provision nor any language suggesting it." (279 U. S. at 419)

Petitioner in this case relies upon *Colorado* v. *United States*, 271 U. S. 153. Not only did the District Court and the Court of Appeals clearly point out the inapplicability of that decision in the present proceeding, but this Court itself has clearly distinguished the situation presented in *Colorado* v. *United States* from the type of situation presented here.

Thus, in the *Central New England Case*, this Court said:

> "We need not decide whether such may be the effect of a proper order of the Commission on contracts previously entered into by the carrier and not expressly mentioned in the order, where the contract and the order necessarily conflict. See *Colorado* v. *United States*, 271 U. S. 153, 165; *New York* v. *United States*, 257 U. S. 591, 601; cf. *New England Divisions Case*, 261 U. S. 184. But without such a conflict, there could be no justification for holding that the order would also operate *sub silentio* to release a carrier from a contract merely because it has ceased to be of value through compliance with the order. This is especially the case where the other party to the contract is another common carrier with whose financial condition the Commission is equally concerned." (279 U. S. at 419-420.)

Petitioner argues (Petition, p. 13) that this Court should grant review "to clarify the extent of the authority of

the Commission * * *." That issue, however, is not involved at all in this case. If petitioner wished to try out that issue, the proper place to have done so was before a three-judge court as provided by 28 U. S. C., Chap. 157, Sec. 2321-5. Here, the only issue is whether a permissive abandonment order of the Commission, which does not purport to relieve petitioner of its private contractual obligations, nevertheless has that effect by operation of law where the order and the contract, as found by the Commission and both courts below, do not conflict.

Petitioner's statement (Petition, p. 10) that major finding No. 8 of the Commission is a "deliberate" finding that abrogation of the rental obligation is in the public interest is not true and finds no support whatever in the record, as a reading of the report of the Commission or the decision of the Court of Appeals will readily show. This argument of petitioner was fully considered by the Court of Appeals. That Court said (Petition, p. 29):

> "There are several criticisms of this reasoning. The first and foremost is that the Commission, although urged by appellant to do so, declined to make a finding that payment without use would be an undue burden on GM&O and on interstate commerce. The fact of the matter is that the Commission found in effect that payment without use would not be an undue burden on GM&O, since it stated specifically that the proposed new route would be profitable to GM&O even if it was required to continue making payments to Illinois Central on the abandoned line."

The Court of Appeals also said (Petition, p. 30):

> "Appellant's brief, apparently seeking to bridge a gap in its effort to demonstrate that the continued payments are in conflict with, and are therefore nullified by, the Commission's certificate authorizing the abandonment of the old line, seeks mightily to give the impression that the Commission's finding of un-

> due burden in the event of continued operation, also amounted to a finding that the payment of rent without use constituted such a burden. Without proceeding through any logical process of reasoning to persuade us that this is true, appellant simply treats the certificate as standing for this proposition."

In view of the specific finding of the Commission that it had no authority to relieve petitioner of its private contractual obligation, the Commission's finding No. 8 could not possibly have the effect contended for by petitioner. Both the District Court and the Court of Appeals were correct in so holding.

In addition to the *Central New England Case,* both the District Court and the Court of Appeals also very properly relied on the decision of this Court in *Regents of the University System of Georgia* v. *Carroll,* 338 U. S. 586. In discussing this decision, the Court of Appeals said (Petition, p. 32):

> "Although the *Regents* case, *supra,* is not a railroad case, the reasoning of the Supreme Court in that case is quite apposite and is persuasive of the proposition that the licensing and regulatory powers granted to administrative bodies by Congress do not authorize the abrogation of or have the effect of abrogating, private contracts merely because such contract may, to a considerable degree, affect the results sought to be accomplished by the act of regulation or licensing."

There is no conflict whatever between the holding of the courts below and the decisions of this Court, which clearly establish that the permissive abandonment certificate of the Commission does not relieve a carrier from its private contractual obligations which are not in conflict with the certificate.

B. Petitioner's Arguments Concerning Matters of Ordinary Contract Law Relating to the Construction of the Contract Have Already Had the Full Consideration of Both the District Court and the Court of Appeals.

Petitioner attempts to raise in this Court the question whether the contract itself imposed on petitioner the obligation to pay rent and taxes in the absence of use by petitioner of respondent's line of railroad. This question is one relating solely to the interpretation of the contract. It has received the fullest consideration by both the District Court and the Court of Appeals, and both have determined this question adversely to petitioner.

Petitioner agreed to pay rent and taxes for "the right to use" a portion of respondent's railroad. Not only is this language clear on its face, but, after the fullest consideration of this language in the light of all the other provisions of the contract, both the District Court and the Court of Appeals have determined that petitioner's arguments on this point are without merit. Petitioner has shown nothing which would warrant this Court in giving further consideration to these questions of ordinary contract law.

CONCLUSION.

1. The Commission alone has administrative jurisdiction. It has acted. Its decision is final as the statutory method for review was not followed.

2. There is no question of general public importance requiring the granting of the writ. No one, other than the two companies, can possibly have any interest in the question of whether the payments should be made.

3. There is no conflict in judicial decisions of the United States Courts of Appeals, nor any uncertainty in the decision of this Court in the *Central New England Case.*

For the reasons set forth above, we submit the writ should not be granted.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 506

GULF, MOBILE AND OHIO RAILROAD COMPANY,
Petitioner

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent

REPLY BRIEF FOR PETITIONER

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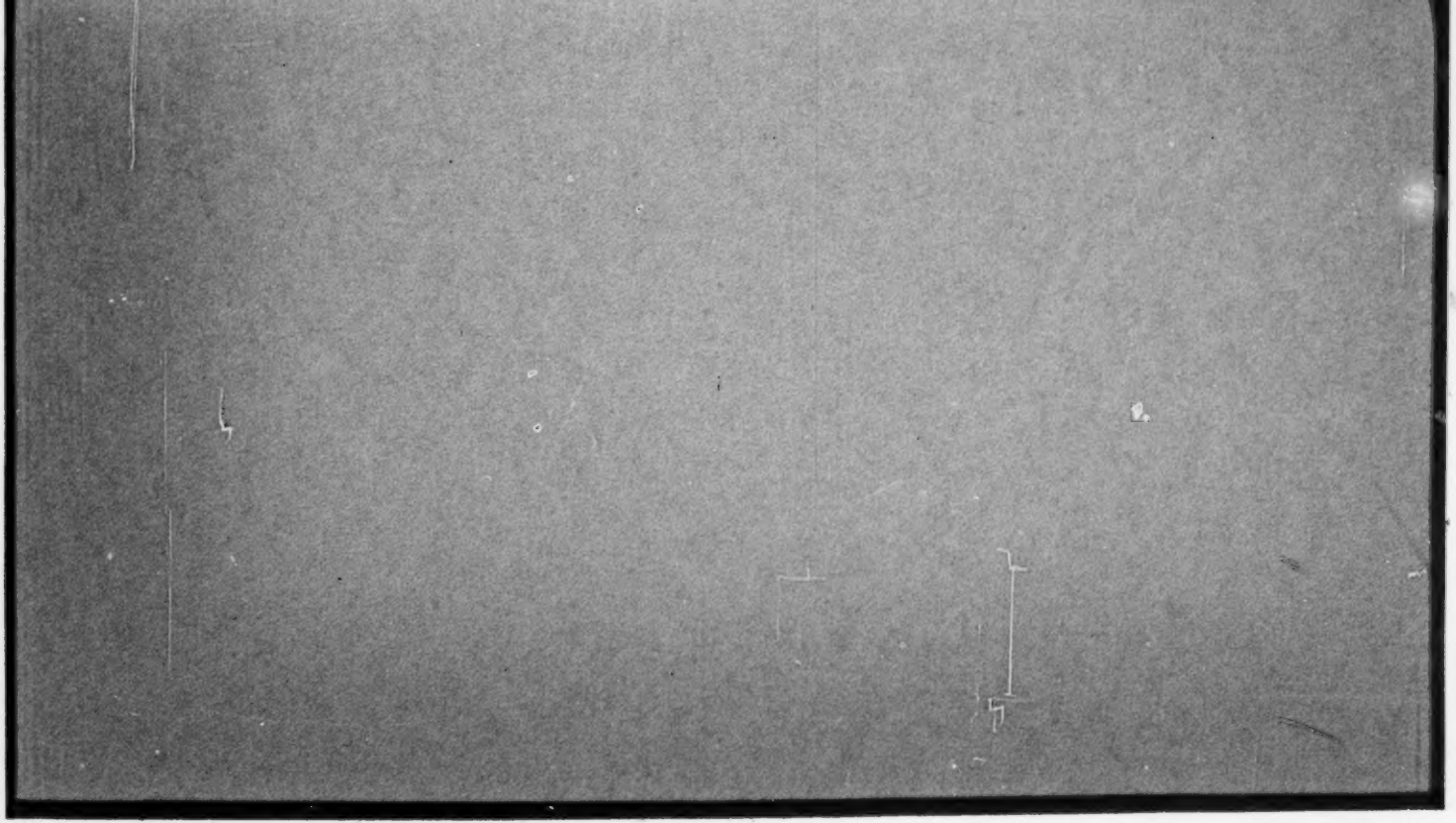

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REPLY BRIEF FOR PETITIONER

We address this Reply Brief to the single proposition which demonstrates the invalidity of the positions taken in Respondent's Brief. That proposition is as follows:

> The Commission's Disclaimer of Jurisdiction of Petitioner's Rental Obligation Under the 1906 Contract Was Not a "Denial By the Commission of . . . Relief" From the Contractual Obligation. (Respondent's Brief, p. 5) [1]

I.C.'s position during the proceedings before Commission was that the Commission had no power to determine whether or not GM&O would continue liable to pay rent to I.C. under the contract. While GM&O urged the Commission to make that determination, the Commission accepted I.C.'s contentions, and held that it was the province

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[1]Hereinafter Petitioner is referred to as GM&O and Respondent as I.C.

of the courts, not of the Commission, to determine the effect of its orders upon contractural obligations of any kind. (R. 87-96; 282 I.C.C. at pp. 331-335)

GM&O acquiesced in that ruling.

It is necessarily implied in paragraph (18) of Section 1 that a certificate of public convenience and necessity is all that is required of the Commission to effect the congressional purpose to eliminate the waste of trackage operations that no longer serve any public need. But Congress did not leave it to implication. In paragraph (20) of Section 1 it was provided:

> "From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby."[2]

Section 1 (18)-(20) presupposes the undeniable fact that the cost of an operation that no longer serves any public need is a waste of money, hurtful both to the railroad and the public. The congressional purpose is to eliminate the waste.

Since I.C. was an interstate railroad, the Commission was required to determine the effect, if any, of the loss of rent upon its ability to serve the public. But I.C. did not claim and introduced no evidence that its ability to serve the public would be in anywise affected. The Commission's major finding No. 8 is a conclusive determination that the "injury" to I.C. would be "outweighed" by the resulting "benefit to . . . [GM&O] and the public."

In the subsequent court proceedings, I.C. claimed that it was of no interest to the public whether GM&O retained or paid to I.C. the stipulated rent after the authorized

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[2]See Appendix D, p. 52 of Petition.

abandonment, and that the private obligation was paramount to the public duty. The courts below adopted that conclusion, from which it would follow that Congress and the Commission had no constitutional power to deprive it of its rental income.

As to the power of Congress under the commerce clause of the Constitution over previously made contracts that come to conflict with the public duties of railroad, we adopt as our brief what this Court said in *Norman* v. *Baltimore & Ohio R. Co.,* 294 U.S. 240, at p. 302, and at pp. 307-310, and the cases cited therein, particularly *Louisville & N. R. Co.* v. *Mottley,* 219 U.S. 467. In *Transit Commission* v. *United States,* 289 U.S. 121, at 127, and *Thompson, Trustee* v. *Texas Mexican Ry. Co.,* 328 U.S. 134, at 148, this Court held in vigorous language that the public does have an interest in rental obligations under trackage contracts of one interstate railroad to another, within the jurisdiction of the Commission to regulate. It is the exclusive function of Congress and its administrative agencies, not to be usurped by the courts, to determine the need for regulation of such obligations. *American Communications Association* v. *Douds,* 339 U.S. 382, at 400, 401.

In view of the congressional intent that the Commission's certificates of public convenience and necessity should have the effect of relieving railroads and the public of the cost of operations that serve no public need, if the Commission intended that rents should continue to be paid after abandonment of trackage operations, it would be necessary to make it a condition of the authorization of abandonment. There was no such condition. To the exact contrary, the Commission found that continued operation, the cost of it, would impose an unnecessary and undue burden on GM&O *and* interstate commerce—both in the same phrase. And "major finding" No. 8, ignored by both courts below, is conclusive:

> "That on the whole the benefit to the applicant and the public from the proposal will outweigh *any* injury which *may* be inflicted thereby on the protesting railroads."[3]

The jurisdiction of the Court in this collateral proceeding was limited to a declaration of the effect of the certificate upon GM&O's obligations under the 1906 Contract, including the rental obligation; and that must be determined by the purpose of Section 1 (18) -(20) as construed by this Court to save to the public and to GM&O the cost of an operation that would be of no benefit to either.

The Commission's "major finding" and the finding of an unnecessary and undue burden upon interstate commerce, were beyond attack or question in any court since I.C. elected not to invoke the only remedy it had, an appeal to the full Commission under Section 17 (9) of the Act and, failing there, to a three-judge district court. *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125 at 139, 140; *Holmes* v. *United States,* 89 F. Supp. 894 at 897, affirmed per curiam, 339 U.S. 927, rehearing denied, 339 U.S. 954.

The order and certificate were the administrative equivalent of a final judgment of a court. The one-judge district court below had no jurisdiction to review the facts found and conclusions reached by the Commission upon which the certificate was based. But, having assumed a jurisdiction vested exclusively in the three-judge district courts, the courts below erred again when they ignored, without mention, "major finding" No. 8 and misconstrued the Commission's disclaimer of jurisdiction to determine the effect of its Order and Certificate on rent and taxes. See Judge Rives dissent, 225 F. 2d 827-828; R. 477-479[4]; and *Southern Ry. Co.* v. *State of Georgia,* 4 S.E. 2d 233, 188 Ga. 1, denying the contention that the Commission's dis-

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[3]R. 102; 282 I.C.C. 340.

[4]See Appendix A, pp. 44-46 of Petition.

claimer of jurisdiction of a contractual obligation should "be construed to place a qualification or limitation upon an unambiguous certificate granted by it."

A dismissal of a petition or a prayer for relief of any kind for want of jurisdiction determines nothing but that jurisdiction is lacking. The merits of the claim for relief are untouched; and in the instant case the Commission's intention to leave the question to determination by courts of competent jurisdiction in any litigation that might subsequently arise was reflected in what it said regarding the two cases (*Western Pacific R. Co.* v. *Nevada-California-Oregon Ry.*[5] and *Meacham* v. *Louisville & N. R. Co.*[6]) in which it was held that a certificate of abandonment relieved the railroad of its contractual obligations:

> "However, in neither of these cases did we attempt to determine any private or contractual right or to relieve the carriers involved of any financial obligations under their contracts. Such matters were left to the courts *who exercised their jurisdiction in the premises and found that our certificates in those particular circumstances were a defense to the enforcement by them of the contracts presented.* There was no intimation from the courts that we should have by order declared the legal effect of our certificate on existing contracts of the applicant carriers."[7]

But the Commission does not permit its lack of jurisdiction of contractual obligations to interfere with its duty to determine questions of fact and reach conclusions in determining what is and what is not in the public interest.

In *International-G.N.R. Co. Abandonment,* 202 I.C.C. 91, 96, the Commission said:

> "Carrier obligations under charter or contract are matters which we cannot undertake to decide and which cannot, in any event, operate to restrict our

[5] (N.D. Calif., 1930), 40 F. 2d 731.
[6] (1943), 293 Ky. 642; 169 S.W. 2d 830.
[7] R. 90; 282 I.C.C. 333.

jurisdiction under the act to consider and determine questions of public convenience and necessity."

To the same effect is *Texarkana & F. S. Ry Co., et al., Abandonment,* 249 I.C.C. 563, 566, involving abandonment of operation under a trackage contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date delivered three copies of the foregoing Reply Brief for Petitioner to Honorable D. K. McKamy, Attorney for Respondent.

This 5th day of December, 1955.

B. A. MONAGHAN

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IN THE

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OCTOBER TERM, 1955.

No. 506.

GULF, MOBILE AND OHIO RAILROAD COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for a rehearing of the Order of this Court entered on January 9, 1956, denying its petition for a writ of certiorari and that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Fifth Circuit affirming the judgment of the District Court for the Northern District of Alabama.

GROUNDS FOR GRANTING PETITION FOR REHEARING.

The fact that GM&O* itself applied to the Interstate Commerce Commission for authority to abandon operation over I. C.'s railroad is the decisive basis for the majority decision of the Court of Appeals that the obligations of GM&O to pay rental and taxes under paragraph 7 of the 1906 trackage contract still exists. If GM&O had abandoned pursuant to a mandatory order of the Commission issued in a proceeding instituted by the Commission itself (instead of by GM&O), clearly GM&O would not be liable for damages to I. C. for breach of the mutually executory phases of the 1906 Contract. In such event, GM&O would be liable only by way of restitution to I. C. for any performance which I. C. has rendered under the contract and for which it has not been compensated.[1]

GM&O should not be treated as a mere volunteer. The situation is the legal equivalent of one involving a mandatory statutory direction.

This case sharply presents this question: Is continued contractual liability of a railroad acting under an order of the Intertsate Commerce Commission dependent upon whether the Commission proceeding was initiated by the Commission or by the carrier itself? This Court should grant a writ of certiorari to determine that question.

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* Petitioner is herein referred to as "GM&O," and Respondent as "I. C."

[1] See *New York Central & Hudson River R. Co. v. Gray* (1916), 239 U. S. 583.

CONFLICT BETWEEN CIRCUITS.

The decision below is in conflict with the underlying philosophy of the decision of the Court of Appeals for the Second Circuit in **L. N. Jackson & Co., Inc., v. Royal Norwegian Government** (1949), 177 F. 2d 694 (reversing **L. N. Jackson & Co., Inc., v. Lorentzen et al.**[2]). It was there held that a steamship operator was excused from performing a contract although the operator, in furtherance of a Congressional wartime policy, had voluntarily submitted itself to the orders of the United States Maritime Commission and therefore was instrumental in bringing about the direction by the Commission which prevented it from performing its contract for the carriage of goods.[3]

In this case, the Court of Appeals for the Fifth Circuit held that because GM&O, in furtherance of a strong Congressional policy, instituted the Commission proceedings, it cannot rely upon what would otherwise be an excuse for non-performance.

CONFLICT WITH DECISIONS OF THIS COURT.

In the unanimous opinion of this Court in **Colorado v. United States,**[4] Mr. Justice Brandeis stated that a certificate of abandonment "issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens . . ."[5] and he referred twice to the railroad's "Federal duty . . . efficiently to render transportation

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[2] (S. D. N. Y., 1949), 83 F. Supp. 486.

[3] To like effect is the decision of the New York Court of Appeals in *Mawhinney v. Milbrook Woolen Mills* (1921), 231 N. Y. 290, 132 N. E. 93, cited with approval by the Court of Appeals for the Second Circuit in the case above referred to.

[4] (1926), 271 U. S. 153.

[5] 271 U. S., at 162.

services in interstate commerce."[6] It was said in **Texas v. United States**[7] that by the Transportation Act of 1920 the railroads "were subjected to the paramount federal obligation to render the efficient and economical service required in the maintenance of an adequate system of interstate transportation." In each of those cases, the railroad initiated the proceedings before the Commission.

But in the opinion of the majority of the Court of Appeals in this case it is said:

> ". . . we know of no rule of law that makes such duty paramount or superior to the duty to carry out its solemnly made contracts."[8]
>
> "Appellant (GM&O), in effect, says that even if the failure of performance was brought about by its act, it was forced into this action by its duty to the public. This line of argument seems to us to be specious."[9]

If this federal duty is not paramount to a contractual duty, it is not paramount to any duty.

Does such a federal duty exist? The majority of the Court of Appeals says that it does not. If statements of such duty made by this Court are meaningful as expressing a strong and important federal public policy, the decision of the majority of the Court of Appeals is in conflict therewith. This is an important question of federal law which should be decided by this Court.

Lower federal courts, the Commission, and Congress, in the "National Transportation Policy," have all recognized

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[6] 271 U. S., at 163 and 165.

[7] (1934), 292 U. S. 522, 535.

[8] R. 469; Appendix A to Petition for Certiorari, p. 36; 225 F. 2d, at 824.

[9] R. 471; Appendix A to Petition for Certiorari, p. 38; 225 F. 2d, at 824, 825.

that the public interest requires that economies and efficiencies in carrier operations be effected.[10] If railroads were under no duty to bring to the attention of the Commission opportunities to render better, more economical, and more efficient service, this public policy would be frustrated and sterilized. It would be impracticable, even with an army of investigators, for the Commission itself to ferret out all such opportunities or any appreciable number of them as a basis for itself initiating a proceeding.

If state laws are subordinate to this federal obligation of interstate railroads, as was held by this Court in **Colorado v. United States**, and in **Texas v. United States**, private contractual obligations must of necessity be subordinate to it.

CONCLUSION.

For the reasons set forth above, and because of the great public importance of the basic question here presented in the implementation of the National Transportation Policy as declared by Congress, it is respectfully submitted that this petition for a rehearing should be granted and that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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[10] For example, a three-judge court, in *Clarke v. United States* (Dist. Col., 1951), 101 F. Supp. 587, 591, referred to a "basic principle of public utility regulatory law":

> ". . . if economies in operation are possible the public interest requires such economies. . . . So, if a carrier is operating over an established route, but it appears that it can render the same service or a better service by a shorter or cheaper route, the public interest requires the more economical operation."

And the Commission, in its Sixty-second Annual Report to Congress, for 1948, at page 3, stated:

> ". . . much more must be done to increase the efficiency and reduce the costs of railroad operations. The responsibility for effecting improvements lies directly with the railroads."

Certificate of Counsel.

The foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

.....
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Certificate of Service.

I hereby certify that I have this day delivered three copies of the foregoing petition to D. K. McKamy, Esquire, of counsel for Respondent.

This ... day of January, 1956.

.....
Of Counsel for Petitioner.